



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 100 OF 2019

KENROID LIMITED.....PLAINTIFF

=VERSUS=

AUREUM LIMITED & 8 OTHERS....DEFENDANTS

RULING

Introduction

1. This is ruling in respect of four separate applications and a preliminary objection. The first application is dated 13th March 2019. It seeks the following orders:-

1. Spent

2. *That pending the hearing and determination of both this application and the suit filed herein or until further orders , an interlocutory injunction do issue to restrain the 1st , 2nd , 3rd , 4th , 5th , 6th , 7th , 8th , and 9th defendants in this action and each and or all of them jointly and or severally and or any other 3rd parties either by themselves or their servants and/or agents and/or employees and/ or howsoever from entering upon occupying , constructing on or developing or selling ,leasing ,licensing, transferring, charging ,mortgaging and or in any manner whatsoever transacting in and or over and or in any other manner whatsoever and howsoever dealing with and or interfering with all or any part of all that portion of land situate in the city of Nairobi in the Nairobi area of the republic of Kenya containing by measurement nought decimal three three one four (0.3314) of a hectare of thereabout being land reference number 1870/II/200 being the premises comprised in a grant registered in the land titles registry at Nairobi as Number I.R 65800/1 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Grant and more particularly on land survey plan number 175145 deposited in the survey records office at Nairobi held for the remainder of the term of fifty years (50) from the 1st day of June 1993 together with all rights , easements, advantages and privileges appertaining or belonging thereto or usually held enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as “ the suit premises”) pending the hearing and determination of this suit.*

3. *That pending the hearing and determination of both this application and the suit filed herein or until further orders, a mandatory order do issue for the eviction of the 1st , 2nd , 3rd 4th 5th 6th 7th 8th and 9th defendants , their agents, servants, employees , proxies and any other parties connected to them and or 3rd parties from the suit premises and with these same orders to apply in relation to any purported sub-divisions deriving out of the said suit premises.*

4. *That pending the hearing and determination of both this application and the suit filed herein or until further orders , an order do issue directing the inspector general of police and the OCPD in charge of the area and the OCS in charge of the police station to enforce the court’s orders and ensure that the defendants or any other 3rd parties of any description are not allowed to access or enter upon the suit premises and or to interfere with the plaintiffs quiet possession thereof either by themselves and/or their servants and /or agents and/ employees and/ or howsoever from entering upon occupying , constructing on or developing or selling ,leasing ,licensing, transferring, charging ,mortgaging and or in any manner whatsoever transacting in and or over and or in any other manner whatsoever and howsoever dealing with an or interfering with all or any part of all that portion of land situate in the city of Nairobi in the Nairobi area of the republic of Kenya containing by measurement nought decimal three three one four (0.3314) of a hectare of thereabout being land reference number 1870/II/200 being the premises comprised in a grant registered in the land titles registry at Nairobi as Number I.R 65800/1 which said piece of land with the dimensions abuttals and boundaries thereof is delineated on the plan annexed to the said Grant and more particularly on land survey plan number 175145 deposited in the survey records office at Nairobi held for the remainder of the term of fifty years (50) from the 1st day of June 1993 together with all rights , easements, advantages and privileges appertain or belonging thereto or usually held enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as “ the suit*

premises”).

5. That pending the hearing and determination of both this application and the suit filed herein or until further orders, an order do issue directing the Chief Registrar to ensure that no other titles or transfers or sub-divisions in respect of the suit premises are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or negate the title of the plaintiff in the said suit premises hereinabove described with these same orders to apply in relation to any purported sub-division deriving out of the said suit premises.

6. Spent

7. That orders requiring that the 2nd 3rd 4th 5^h 6th 7th 8th and 9th defendants/respondents and any third parties who are interested in or have stake in the sit premises do appear in and attend to this honourable court for the purpose of their physical identification and the identification of their places of abode and places of work.

8. That the costs of this application be provided for.

2. The second application is dated 29th April 2019. It is brought by the 2nd and 3rd defendants and it seeks the following orders:-

1. That the names of the 2nd and 3rd defendants be struck out of these proceedings as defendants in case.

2. That the suit against the 2nd and 3rd defendants be dismissed for not disclosing any cause of action against the 2nd and 3rd defendants.

3. That cost of this application be provided for.

3. The third application is dated 29th April 2019 it is brought by the 1st, 2nd and 3rd defendants and it seeks the following orders:-

1) spent

2) That the affidavits sworn by Mr Madhav Advocate in support of the plaintiffs application dated 13th March 2019 together with all the annexures attached thereto, be expunged from the record and these proceedings.

3) That the witness statement of Mr Madhav Bhalla, Advocate dated the 13th March 2019 in support of the plaintiff's case herein be expunged from the record and these proceedings.

4) That an order do issue barring Mr Madhav Bhalla, Advocate or the firm of advocates, Taibjee & Bhalla Advocates, LLP, from appearing in this matter either as witness against the 1st defendant, swearing any affidavit against the 1st defendant, or acting as advocates against the 1st defendant in these proceedings involving Land reference 1870/11/200, IR number 65800/1.

5) That as a consequence of the above, the application dated the 13th March 2019 be dismissed with costs for want of any affidavit and evidence in support thereof.

4. The fourth application is dated 8th May 2019. It is brought by the 4th defendant and it seeks the following orders:-

1) That the 4th defendant's name be struck out of these proceedings as a defendant.

2) That the suit against the 4th defendant be struck out for disclosing no reasonable cause of action in law against the 4th defendant.

3) That the costs be provided for.

5. All the above four applications and a preliminary objection have been filed as a result of the suit filed herein by the plaintiff against the defendants. The 2nd and 3rd defendants are directors of the 1st defendant. On 21st June 2018, the plaintiff and the 1st defendant entered into a sale agreement for the purchase of LR No.1870/11/200 (IR No.65800/1). (Suit property). In the course of undertaking due diligence, the advocate for the plaintiff noticed that the suit property was actually registered in the name of Horizon Hills Limited. Further due diligence revealed that there were two companies bearing the same name of Horizon Hills Limited but having different directors.

6. The vendor's advocate promised to have the issue of the two companies sorted out. The 4th defendant is one of the directors of Horizon Hills Limited together with the 3rd defendant. The 6th, 7th and 8th defendants are directors of the 5th defendant which is a parallel company. If the documents filed herein are anything to go by, this is a case which shows outright fraudulent activities whose sole aim is to enrich certain individuals at the expense of others.

7. The 9th defendant is now the current registered owner of the suit property allegedly having purchased it from the 5th defendant. I will first deal with the issue of the preliminary objection.

Preliminary objection.

8. The 1st, 2nd and 3rd defendants contend that this court lacks jurisdiction in view of the provisions of section 6 of the Arbitration Act. They contend that the agreement between the 1st defendant and the plaintiff provided for arbitration in case of a dispute. The 1st, 2nd and 3rd defendants point out to clause 5 of the agreement.

9. I have looked at the agreement and indeed confirm that there was an arbitration clause. The parties who have appeared did not comment about this issue. The plaintiff never touched on the issue of jurisdiction in its submissions. However this notwithstanding I have to determine this issue. The 1st, 2nd and 3rd defendants have cited section 6 of the Arbitration Act. That section deals with stay of suit pending reference to arbitration. If the 1st, 2nd and 3rd defendants were keen on the matter being referred to arbitration, then they will have entered appearance and before filing any pleadings applied for stay of proceedings. The 1st, 2nd and 3rd defendants have already filed their defence. They cannot therefore invoke section 6 of the Arbitration Act. In any case, the suit property has allegedly been transferred to the 9th defendant and therefore even if a proper application would have been made, the court would not have referred the matter to arbitration. The issue in this case is based on fraud and this court has jurisdiction to determine this dispute. I therefore find no merit in the preliminary objection which is overruled with costs to the plaintiff.

It is so ordered.

The first application.

10. In this application the plaintiff contends that it entered into a sale agreement with the 1st defendant for the purchase of the suit property on 21st June 2018. As the counsel for the plaintiff was undertaking due diligence, it turned out that the suit property was in the name of a company called Horizon Hills Limited. It further emerged that there were two companies bearing the same name. When the plaintiff's advocate raised this issue with the advocate for the vendor, the vendor's advocate assured the plaintiff's advocate that that was a case of duplication of names in the Companies Registry and that the problem was going to be sorted out.

11. As promised, there was a change of name from Horizon Hills Limited to the 1st Defendant's name. The advocate was even shown a copy of title where the certificate of change of name had been registered in the title. A sum of Kshs.56,000,000 was then released to the 1st defendant's advocate to hold as stake holder. The plaintiff heard wind that the same property was being sold. It requested the vendor to allow it to put up a sign indicating that the property was already sold. This was done but the sign was removed on the same night. Another signage was placed inside the suit property.

12. Further investigations revealed that the property had now been sold by the 5th Defendant to the 9th defendant who proceeded to take possession forcefully after she ejected the guards of the vendor. The plaintiff tried to get a refund which was not forthcoming. This is why the plaintiff filed this application.

13. The 1st, 2nd and 3rd defendants opposed the plaintiff's application based on a replying affidavit sworn by the 2nd defendant on 29th April 2019. The three defendants contend that the plaintiff's application is an abuse of the process of the court which is meant to frustrate the conclusion of the agreement entered into with the 1st defendant. The three defendants also contend that the plaintiff's application is not supported by a competent affidavit.

14. The three defendants further contend that the plaintiff's only interest is purchaser's interest which can only crystallize at the conclusion of the sale agreement. The three contend that for now the 1st defendant is the registered owner of the suit property and that as such the three cannot be evicted from their own property. The three defendants argue that the plaintiff's interest have been taken care of by the registration of a caveat on the basis of purchase.

15. The three defendants further argue that the plaintiff cannot purport to call them grabbers when the property is still in the name of the 1st defendant and that the prayers the plaintiff is seeking cannot be granted.

16. The 9th defendant opposed the plaintiff's application through a replying affidavit sworn on 21st June 2019. The 9th defendant contends that she is a stranger to the 1st, 2nd and 3rd, 4th defendants; that she purchased the suit property on 12th September 2018 from the 5th defendant whose directors who executed the agreement are the 6th and 7th defendants. The 9th defendant annexed an extract of the register which shows that she is the registered owner of the suit property having been transferred to her by the 5th defendant.

17. The 9th defendant further argues that the plaintiff only paid Kshs.56,000,000/- as deposit and that can be refunded by the 1st defendant if the plaintiff is successful in the suit. She argues that if an injunction is issued, it will affect her as she will not be able to develop or even dispose of the suit property. She argues that in the circumstances, the plaintiff has not disclosed a prima facie case to warrant issuance of an injunction.

18. I have carefully considered the plaintiff's application as well as the opposition to the same by the 1st, 2nd, 3rd and 4th defendants. I have also considered the submissions filed by the parties affected by the application. The plaintiff is seeking both temporary and mandatory injunctions. The plaintiff is also seeking assistance of the police to enforce any orders which the court will grant. The plaintiff is also seeking that the court directs that the defendants do come to court for purposes of identification as to who they are and their places of abode as well as places of work. The plaintiff also wants certain orders directed at the Chief Land Registrar.

19. I have perused the documents relied on by the plaintiff and the defendants and particularly the 9th defendant. The main issue here is whether an injunction should be granted as prayed for by the plaintiff. The plaintiff has come to court on the basis of a sale agreement which

has not been completed. The main prayer in the plaint is for an order of specific performance. With this in mind, the issue for determination is whether the plaintiff has disclosed a prima facie case to warrant protection.

20. There is no contention that the plaintiff entered into a sale agreement with the 1st defendant for the purchase of the suit property. The plaintiff has already paid a down payment of Kshs.56,000,000/=. The plaintiff is still willing to clear the balance. The cause of failure to complete the sale is that it has turned out that the same property has been sold to the 9th defendant. Though there are two companies bearing the same name, the plaintiff had been made to believe that one of the company's names had changed to that of the 1st defendant. The documents relied on by the plaintiff show that though there was registration of change of name against the title, that entry was later cancelled. This is the case with the caveat which the plaintiff had registered against the title. It is after this cancellation that the 9th defendant appears to have been registered.

21. A cursory look at the documents show that the two companies have a common thread. For instance the 4th defendant is shown to be a director of one of the companies. He is a director together with the 3rd defendant. The 2nd defendant is a director of the third defendant as well as the 1st defendant. Though the other company has different directors i.e the 6th, 7th and 8th defendants, the title to the suit property is the same which is being traded by the two companies bearing the same name. In the circumstances the plaintiff has made out a prima facie case to warrant issuance of an injunction to protect the property as the litigation goes on .

22. The plaintiff is seeking a mandatory injunction. The plaintiff wants the defendants to be evicted from the suit property. The principles regarding issuance of mandatory injunction are very clear. A mandatory injunction can only be granted in a clear case which can be decided in a summary manner or where the defendant appears to be stealing a march on the plaintiff. In the instance case, the plaintiff is in the process of purchasing the suit property. This sale has not been completed as to confer a definite interest in it. It will therefore not be proper to issue a mandatory injunction.

23. What prima facie comes out is an intricate web of fraud. Parties appear to be using shadowy people to achieve their personal interests. For instance, I wonder why the 9th defendant who claims to have purchased the property from the 5th defendant has been let to remain on it without a question being asked on why a company bearing the same name is interfering with its title.

24. The plaintiff is seeking an order of the court directing that the defendants be called to court so that their identities can be known and their places of abode be known. I do not think that it is the business of the court to summon litigants to court for unmasking them or seeking to know where they reside or where they work. If a litigant is served and does not appear, the law is clear as to what should happen. If the plaintiff will get a decree in its favour, still the law is clear on how the same can be executed. I therefore find that the prayer for ordering litigants to come to court cannot be granted.

25. I have already said hereinabove that the plaintiff is yet to be the owner of the suit property. The process to become the owner has to run its course or a determination be made by the court in one way or another. I have already rejected a prayer for a mandatory injunction. The issue of police assistance does not therefore arise. I therefore allow the plaintiff's application to the extent that an interlocutory injunction is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants jointly and severally or any other third parties either by themselves or their servants and or agents, employees or whosoever from constructing on, developing, selling, leasing, licencing, transferring, charging, mortgaging and or in any manner whatsoever interfering with all or any part of LR No.1870/11/200(IR No.65800/1) pending the hearing and determination of this suit. A further order is granted directing the Chief Land Registrar not to entertain any transfer or subdivisions of the suit property namely LR No.1870/11/200 (IR No.65800/1) pending hearing and determination of this suit. The costs of this application to be provided by the defendants.

It is so ordered.

The Second application.

26. The 2nd, 3rd defendants are seeking to have their names struck out from this suit and the suit against them struck out. They contend that they are directors of the 1st defendant company which is a legal entity capable of being sued in its name and that their joinder in this suit is an attempt to embarrass them. As a support to their contention on embarrassment they have annexed a photocopy of a report on the suit property which they contend misreported the matter.

27. The two contend that the plaintiff has not showed any grounds which will require the piercing of the corporate veil of the 1st defendant which will justify their presence in this suit.

28. The plaintiff opposed the application by the 2nd and 3rd defendants based on grounds of opposition filed on 15th May 2019. The plaintiff contends that the application is bad in law; that there is no basis upon which the striking out can be entertained; that the 2nd and 3rd defendants are fraudulently using the 1st defendant company as a smoke screen and that the suit discloses reasonable cause of action against the 2nd and 3rd defendants.

29. I have considered the application by the 2nd and 3rd defendants as well as the opposition to the same by the plaintiff. There are two issues to be addressed. The first is the issue of corporate nature of the 1st defendant vis-a-vis the 2nd and 3rd defendants as directors. The other issue is on cause of action. These two issues are intertwined and I will address them at the same time.

30. I agree that a company is a separate legal entity which can be sued and sue. It is also not in contention that the sale agreement was between the plaintiff and the 1st defendant. The case of **Salomon V Salomon (1897) AC 78** stated the importance of a company being treated as separate from its directors or shareholders . There have been a line of authorities which have emphasised the need of treating

directors of shareholders as being separate from the company. There are however instances when the corporate veil can be pierced and the directors of a company sued in their individual capacity. Examples are where directors are acting fraudulently or where the directors are using the company as a mask to commit fraud, then directors can be sued.

31. In the instant case, there are serious allegations of fraud on the part of the directors of the 1st defendant as to call for them to defend themselves against those allegations. In this case for instance, the suit property was sold to the plaintiff by the 1st defendant which was not the registered owner. When this issue was raised by the plaintiff's counsel, the advocate of the vendor promised to have the names changed. The name was changed from Horizon Hills Limited to the 1st defendant's name but the change which was effected by having the certificate of change of name registered on the title was subsequently cancelled and the suit property was sold by Horizon Hills Limited. This is a serious indicator of fraud more so given that one of the directors of Horizon Hills Ltd is the 3rd defendant.

32. The suit as filed has raised a serious cause of action which cannot warrant a striking out of the suit against the 2nd and 3rd defendants. I therefore find no merit in this application which is hereby dismissed with costs to the plaintiff.

It is so ordered.

The third application.

33. In this application, the applicants are seeking to have the affidavit of **Madhav Bhalla** expunged from the record and Mr Bhalla be barred from appearing in this case as either advocate or witness. The applicants contend that Mr Bhalla was the advocate who appeared for both the plaintiff and the 1st defendant in the sale of 21st June 2018. The applicants further contend that Mr Bhalla came across certain privileged information and as such he cannot swear an affidavit in favour of one party. The applicants therefore argue that the supporting affidavit to the application by the plaintiff was made by an incompetent person and in breach of his fiduciary duty to his client.

34. The plaintiff opposed the application by the 1st and 2nd defendant's based on grounds of opposition filed on 15th May 2019. The plaintiff contends that there is no legal basis upon which the affidavit by Mr Bhalla can be expunged; that the confidential information which Mr Bhalla is alleged to have come across is not disclosed; that the application is malafides and that the affidavit has only unmasked the fraud which was being perpetrated.

35. I have considered the application as well as the opposition to the same by the plaintiff. In the instant case Mr Bhalla is not appearing for any party in this case. He has only sworn an affidavit of what he did in this matter. Mr Bhalla's affidavit has been adopted by Amos Odoyo Owawo, the financial director and manager of the plaintiff company.

36. Mr Bhalla has not deposed to any matter which is contentions. He has simply laid out facts as they are based on what he did. He has relied on correspondences which were exchanged between him and the other advocate for the vendor. There is no contention that he appeared for both the vendor and the purchaser but the bulky of the transaction was conducted by a counsel who was acting for the vendor.

37. The applicants have not disclosed any confidential information which may have been given to Mr Bhalla and in any case even if there was such confidential information, it does not extend to covering up alleged fraudulent acts. To this extent the case of **Kamindi Selfridges supermarkets Ltd Vs Kiambu Murutaani Company Ltd (2013) eKLR** is distinguishable . It is therefore my finding that the affidavit by Mr Bhalla contains nothing which can call for exclusion and expunging of the documents relied on. This being the case, the prayer for striking out the application has been rendered superfluous. There is absolutely no merit in this application which is hereby dismissed with costs to the plaintiff.

It is so ordered.

The fourth application.

38. The 4th defendant contends that he was just a director of the 1st defendant company but has since resigned as director and that in any case the 1st defendant is a separate legal entity which can be sued on its own. The 4th defendant further argues that as the agreement was between the plaintiff and the 1st defendant, he cannot be pursued in these proceedings because there is no claim against him in the pleadings.

39. The 4th defendant's application was opposed by the plaintiff based on grounds of opposition filed on 15th May 2019. The plaintiff contends that there is no legal basis for the court to make the orders prayed for; that there are multiple causes of action disclosed against the 4th defendant and that the applications made in bad faith.

40. I have considered the application by the 4th defendant as well as the opposition to the same by the plaintiff. I have also considered the submissions by the 4th defendant. The 4th defendant admits that he was a director of the 1st defendant but that he resigned. He does not state when he resigned. This transaction started last year. However be that as it may there are documents herein which show that he is a director of Horizon Hills Limited. This could be either of the two companies bearing the same name. One of the two companies is alleged to have sold the suit property to the 9th defendant. There are serious allegations of fraud raised herein. The 4th defendant having been a director of the two companies, he cannot shelter under the corporate nature of the 1st defendant. Where there are allegations of fraud, a director can be sued as well as the company. The pleadings as they are disclose a cause of action against the 4th defendant. I therefore find no merit in this application which is dismissed with costs to the plaintiff.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 17th day of September 2019.

E.O .OBAGA

JUDGE

In the presence of :-

Mr Taib for Plaintiff, Mr Otieno Willis for 1st, 2nd and 3rd defendants and for Mr Oruenjo for 4th defendant,

Ms Mwirichia for 5th to 8th defendants and Mr Otieno Bernard for 9th defendant

Court Clerk : Hilda

E.O.OBAGA

JUDGE